

**AOPA COMMITTEE
OF THE
NATURAL RESOURCES COMMISSION
November 17, 2015 Meeting Minutes**

MEMBERS PRESENT

Jane Ann Stautz, Chair
R.T. Green
Jennifer Jansen

NATURAL RESOURCES COMMISSION STAFF PRESENT

Sandra Jensen
Dawn Wilson
Jennifer Kane

PARTICIPANTS AND GUESTS PRESENT

Sean Wooding	Steve Snyder
Jack Birch	Craig Doyle
Gordon Doyle	Robert Eherenman
Andrew Palmison	

Call to order and introductions

The Chair, Jane Ann Stautz, called the meeting to order at 8:10 a.m., EST, on November 17, 2015 in the Garrison, Gates Room of the Fort Harrison State Park, 6002 North Post Road, Indianapolis, Indiana. With the presence of all three members, the Chair observed a quorum.

Consideration and approval of minutes for meeting held on September 24, 2015

R. T. Green motioned to approve, as presented, the minutes of the meeting held on September 24, 2015. Jennifer Jansen seconded the motion. Upon a voice vote, the motion carried.

Consideration of objections with respect to Findings of Fact and Conclusions of Law with Nonfinal Order in the matter of *Sudlow and Heckaman v. Slocum, et al.*; Administrative Cause No. 12-119W

Sandra Jensen, Administrative Law Judge, provided a brief overview of the matters presented by the parties' objections for consideration by the AOPA Committee. Jensen explained that immediately after issuing the nonfinal order Robert Eherenman, counsel for Thomas A. and Nancy A. Yoder ("the Yoders"), provided notice that a scrivener's error existed at Finding 58 identifying the Yoders as the owners of Lot 12, when, in fact, the evidence is clear that the

Yoders are the owners of Lot 13. Jensen further advised that she had identified a typographical error at Finding 10 reflecting that the administrative hearing was conducted on July 6, 2014, when the hearing was actually conducted on July 6, 2015. Jensen noted that she had previously advised the parties of her intent to correct the two errors without need for the parties to address them through formal objections.

Jensen summarized the objections filed by the Claimants, Anna C. Sudlow and Constance Sudlow Heckaman (“Sudlow”), as well as the objections filed by Third Party Respondents, the Yoders, Don Ermal and Marilyn Lois Marsh (“the Marshes”), the Mark G. Doyle and Gordon P. Doyle as Trustees for the Doyle Land Trust (“Doyle Land Trust”) and Kitch Acceptance Corporation (“Kitch”). She observed that each of the parties who filed objections were seeking to have Finding 63 modified to require the parties to maintain only five feet of clear space from the riparian boundaries instead of ten feet as is expressed in the nonfinal order. Jensen recommended that the AOPA Committee grant this revision with respect to the Yoders, the Marshes and the Doyle Land Trust. She explained that with further review of the evidence clearly reveals that each of their respective shoreline lengths are modest, being under 30 feet, and the piers in their present configurations have been in place for many years without complication. With respect to the clear space required for the remaining properties, particularly the Sudlow and Kitch properties, Jensen deferred to the Committee, noting that the shoreline lengths for these properties approximated 50 feet or more. “In addition to the clear space, the Sudlows also raised concern that their riparian zone and the riparian zone of Joan M. Slocum (“Slocum”), was established by inappropriate methods.”

Stephen R. Snyder, representing the Sudlows, offered that his clients did not seek to have the Third Party Respondents joined as parties to this proceeding emphasizing that the Sudlows formally objected to Slocum’s motion for joinder. Snyder reiterated his clients’ position that joinder of those parties was not necessary.

Snyder presented each of the members with a copy of Exhibit 10, which had been admitted into evidence during the administrative hearing. Referring specifically to Attachment B of Exhibit 10, Snyder explained the document provided a diagram of the Sudlows’ proposal for establishing riparian zones associated with the Sudlows’ and Slocum’s properties. He added that establishing the piers as his clients proposed would avoid any impact upon the riparian zones of any of the other parties and would allow for both the Sudlows’ pier and Slocum’s pier to remain in their present positions.

Snyder observed that the Sudlows’ pier has existed in its present configuration for “many years with the exception that one slip was added to the west side of the pier and a boat lift was then added to the west side of that most recently added slip.” Snyder acknowledged that both of these recent additions were made to the west side of the Sudlows’ pier, which is the side closest to the Slocum. Snyder explained, however, that the dispute between Sudlow and Slocum only occurred when Slocum added two additional sections to her pier; thereby, increasing its length at an angle towards the Sudlows’ pier.

Snyder recognized that the Department of Natural Resources and the Natural Resources Commission routinely follows the nonrule policy document, commonly referred to as

Information Bulletin #56, for establishing riparian zones. Snyder noted that Information Bulletin #56 was skillfully drafted by now retired Judge Stephen Lucas and adopted by the Commission, but emphasized the fact that Information Bulletin #56 is not law; it is only guidance or policy. Snyder underscored the fact that the administrative law judge can deviate from the directives set forth in Information Bulletin #56 and opined that in this case deviation from that guidance would have provided the most appropriate solution.

Snyder, accepting that the Department's surveyor, Rodney Neese, had established a reasonable apportionment of the riparian zones based upon the Sudlows' ownership of 104 feet of shoreline and Slocum's ownership of 59 feet of shoreline, acknowledged that the riparian zones would be apportioned 36.2% to Slocum and 63.8% to the Sudlows. Snyder advised that the Sudlows' proposal apportions the riparian zones in a manner closely resembling the Department's established percentages and stated that any deviation from that apportionment would actually be in Slocum's favor. Snyder concluded that a riparian area established consistent with Sudlow's proposal, while beyond the methodology established by Information Bulletin #56, did achieve a proper apportionment. Snyder added that both Slocum and the Sudlows would benefit from the imposition of the Sudlows' proposal, because neither the Sudlows nor Slocum would be required to relocate their piers. Snyder noted that Rodney Neese, on behalf of the Department, considers means of minimizing impacts to riparian owners and historic pier placements in developing riparian zone proposals concluding that the Sudlows' proposal is consistent with that approach.

Jack C. Birch, Counsel for Slocum, countered that it was the Sudlows' most recent additions of a slip and a boat lift, in the direction of Slocum's property, shortly after her purchase that created the necessity for Slocum to move her pier. He explained that the addition of the two pier sections by Slocum occurred during the drought of 2012 and were necessary in order to reach navigable water. Birch noted that Exhibit 10, referred to by Snyder, does not accurately depict the historical location of Slocum's pier. Birch further noted that the Sudlows' proposal assumes that the onshore boundary line shared by Slocum and Kitch is perpendicular to the shoreline, which he advised, is not the case. Birch highlighted for the members that an extension of the shared Kitch/Slocum onshore boundary lakeward would create a triangular shaped riparian zone for Slocum to essentially cut off her access at 175 feet.

The Chair acknowledged understanding of Birch's conclusion based upon review of Exhibit 10.

Birch observed that the Sudlows' original proposal to extend onshore boundaries lakeward would accommodate the Sudlows' most recent additions to their pier to the significant detriment of all the other parties whose properties are located to the west-northwest of the Sudlows' property. This detriment, he noted, was the reason that it became necessary for Slocum to seek joinder of the Third Party Respondents. Birch explained that he had commissioned a review of the Sudlows' proposal for the purpose of calculating the resulting apportionment of the riparian zones between Slocum and the Sudlows'. According to Birch, the outcome was close to an 80% share to Sudlow and 20% share to Slocum.

The Chair questioned the Judge Jensen whether the 80% to 20% apportionment discussed by Birch was included in the evidence of record.

Judge Jensen responded in the negative. Jensen explained that the only evidence as to the apportionment created by the Sudlows' proposal was offered by Rodney Neese, the Department's surveyor. Judge Jensen explained that Neese testified that he could provide nothing definitive without an opportunity to conduct measurements and calculations, but also testified that a visual inspection of the diagram (Exhibit 10, Attachment B) appeared to grant greater than 63.8% share to the Sudlows.

Birch concluded and stated that Slocum did not receive all that Slocum had hoped for from the Judge Jensen's nonfinal order. Birch reminded the AOPA Committee members that Slocum did not file objections. Birch expressed Slocum's belief that the result was fair and acceptable.

Andrew L. Palmison, on behalf of Kitch, stated that his client objects to only one of the 65 findings contained in the nonfinal order. Palmison offered the position that the clear space associated with the Kitch riparian zone should only be five feet, instead of ten feet as is presently required by Finding 63 of the nonfinal order.

Palmison disputed Snyder's position that the Sudlows' proposal does not impact Kitch or the other property owners to the west of the Sudlows' property. Palmison offered that until the dispute began between the Sudlows and Slocum, Kitch had always maintained two slips on the east side its pier, which is the side closest to Slocum. Palmison, showing the members Exhibits 11 and 12, expressed that these exhibits provided greater clarity evidence consistent with Birch's representation that the Kitch/Slocum onshore boundary is not perpendicular to the shoreline. Palmison added that these exhibits clarify the historic placements of the piers from Slocum's property westward, noting that neither Slocum's nor Kitch's piers are in historic locations. Palmison added that the Sudlows' additions had forced Slocum to relocate her pier closer to the Kitch boundary, which, in turn, caused the need for Kitch to remove the two slips in accommodation until these matters were resolved. Palmison stated that it was never Kitch's intent to permanently eliminate the two slips.

Palmison offered the opinion that a universal application of a setback of five feet for all of the riparian zones located to the west of the shared Kitch/Slocum boundary line is appropriate based upon the evidence. Palmison noted that all of these piers have historically existed in their present placements without evidence of safety concerns, navigational difficulties or interference with the public trust.

Robert W. Eherenman, representing the Yoders, agreed with Judge Jensen's recommendation to revise the required clear space associated with the Yoders' riparian zone to five feet on each side of their riparian boundary lines.

Gordon R. Doyle, on behalf of the Doyle Land Trust, stated that they have the shortest length of shoreline, and concurred with the recommendation to revise the nonfinal order to reduce the necessary clear space to five feet.

Craig D. Doyle on behalf of himself and his wife acknowledged that they did not file an objection to the nonfinal order, but expressed the opinion that the ten feet of clearance stated in Finding 63 should be reduced to five feet.

R.T. Green inquired whether the five feet of clearance could be applied to the riparian zones of all of the parties.

Birch indicated interest in maintaining the ten foot clearance with respect to Slocum.

Jennifer Jansen questioned whether the Sudlows would still be required to move their pier if the clear space was reduced from ten feet to five feet. Snyder responded in the affirmative.

The Chair asked whether Sudlows' proposal for establishing the riparian zones would accomplish the 64%–36% apportionment established by the Department and also reflect that apportionment as closely as possible.

Green inquired whether the case could be remanded for further evidence on that issue.

The Chair acknowledged that the AOPA Committee could remand the matter for that purpose or make a determination on the evidence of record.

Green asked Judge Jensen whether the apportionment was considered in issuing the nonfinal order establishing the riparian zones of the Sudlows and Slocum.

Judge Jensen, referring to Finding 32 of the nonfinal order, explained that the record includes the opinion of Neese, who in considering the Sudlows' diagram, determined that the Sudlows' riparian zone appeared larger than would be consistent with a just apportionment. However, Neese's testimony was that specific calculations would be necessary to make a conclusive determination as to the apportionment.

Judge Jensen observed that Principle 4, as stated in Information Bulletin 56, discusses various methods for the just and reasonable apportionment of riparian zones based upon the amount of owned shoreline. She stated that was, at its base, what was considered in issuing the order.

R.T. Green motioned to revise Judge Jensen's Findings of Fact, Conclusions of Law, and Nonfinal Order as follows:

- In Finding 10, delete "July 6, 2014", and insert "July 6, 2015".
- In Finding 58, delete "Lot 13", and insert "Lot 12".
- In Finding 63, delete "ten (10) feet", and insert "five (5) feet".

Jennifer Jansen seconded the motion.

The Chair called for a vote. The motion carried.

Adjournment

Jennifer Jansen moved to adjourn the meeting. R. T. Green seconded the motion. The motion was approved and the meeting adjourned at 9:30 a.m., EST.